UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 100

Docket No. AT-0752-11-0981-I-1

Minh Tuyet Ly,

Appellant,

v.

Department of the Treasury,

Agency.

August 23, 2012

Bobby Devadoss, Esquire, Dallas, Texas, for the appellant.

Gregory S. Prophet and Jessica L. Bachman, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision affirming her removal for providing false/misleading information on an official employment document. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant worked as a Tax Examining Technician at the Wage and Investment Service Centers of the Internal Revenue Service in Chamblee, Georgia. Initial Appeal File (IAF), Tab 9, Subtab 4a. On June 29, 2011, the agency proposed to remove the appellant based on a charge of providing "false/misleading information on an official employment document" with two accompanying specifications. *Id.*, Subtab 4d. In the first specification, the agency alleged that the appellant denied on her July 14, 2010 Optional Form (OF) 306 that she had been fired from any job or quit after being told she would be fired during the last 5 years but that the appellant had been discharged from the American Society for Quality (ASQ) for unfavorable employment or conduct and is not eligible for rehire. *Id.* at 1. In the second specification, the agency similarly alleged that the appellant did not disclose on her July 14, 2010 OF 306 that she was discharged from Franklin Accounting Tax and Services (FATS) for unfavorable employment or conduct and is not eligible for rehire. *Id.* After considering the appellant's written response, on August 22, 2011, the agency effected the appellant's removal. *Id.*, Subtab 4b. The appellant filed a timely appeal with the Board. IAF, Tab 1.

¶3 After a hearing, the administrative judge found that the agency established that the appellant provided false information on her OF 306 and that she did so with the intent to deceive the agency. IAF, Tab 23, Initial Decision at 4. The administrative judge rejected the appellant's assertion that she did not understand the question on the OF 306, given her education and position as a Tax Examining Technician, although the administrative judge acknowledged that English is not the appellant's first language. *Id.* at 4-5. The administrative judge found that the appellant provided incorrect information on her employment documents when she failed to indicate on the July 14, 2010 OF 306 that she was terminated from ASQ and FATS. *Id.* at 5. The administrative judge further found that the appellant failed to provide a plausible explanation for the inaccuracies and that she

therefore provided the incorrect information with the intent to deceive the agency. *Id.* at 5-6.

¶4 The administrative judge also found that the appellant failed to establish her affirmative defense of discrimination on the bases of her race (Asian) or her national origin (Vietnamese). *Id.* at 6. Specifically, the administrative judge found that the appellant failed to identify a similarly situated employee because there was no evidence establishing that the alleged similarly situated employee, Mr. Thorne, omitted information with the intent to deceive the agency or that the same deciding official was involved in both cases. *Id.* at 8. In a footnote, the administrative judge stated that she was not considering the appellant's harmful procedural error claims because they were raised for the first time at the hearing. *Id.* at 10 n.*. Lastly, the administrative judge found that discipline promoted the efficiency of the service, that the deciding official considered the relevant *Douglas* factors, and that the penalty of removal was reasonable. *Id.* at 8-9.

¶5 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3.

ANALYSIS

The administrative judge properly sustained both specifications of the agency's charge.

¶6 In her petition for review, the appellant asserts that the evidence did not support the administrative judge's finding that she intentionally lied or misled the agency on her OF 306. PFR File, Tab 1 at 6. The appellant has provided no reason to disturb the administrative judge's rejection of her assertion that she misunderstood the question asked in light of the evidence relied upon by the administrative judge to make her findings. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board). The administrative judge also found the appellant's

testimony that she had been laid off rather than fired from FATS not credible. Initial Decision at 4; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so). In light of the record evidence on this issue, the appellant has not identified a sufficiently sound reason to overturn the administrative judge's credibility determination. The appellant has accordingly provided no reason to disturb the administrative judge's finding that the appellant provided incorrect information with the intent to deceive the agency on her OF 306. *See* Initial Decision at 6; *see also Scott v. Department of Justice*, 69 M.S.P.R. 211, 226 (1995) (an incorrect statement coupled with a lack of a credible explanation can constitute circumstantial evidence of an intent to deceive), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996).

The appellant has provided no reason to disturb the administrative judge's findings on her affirmative defenses.

Harmful Error

¶7 In her petition for review, the appellant contests the administrative judge's decision not to consider her harmful procedural error claim, asserting that she framed her harmful error claim in her prehearing submission as "[w]hether or not the Appellant's termination from her position was improper and whether the said action was done to promote the efficiency of federal service." PFR File, Tab 1 at 9-10. There is no indication that the appellant timely raised this defense prior to the hearing. Moreover, the appellant's assertion that she somehow raised the issue solely by stating that her termination was "improper" in her prehearing submission is without merit. *See* IAF, Tab 14 at 1.

Discrimination on the Bases of Race and National Origin

¶8 In her petition for review, the appellant renews her argument that the penalty imposed on her was more severe than that imposed on similarly situated employees. PFR File, Tab 1 at 11. In support, she relies on the agency's response to a written interrogatory in which the agency admitted that another agency employee, Mr. Thorne, failed to provide accurate information on his OF 306 but was not terminated. *Id.* at 11-12.

¶9 As properly set forth by the administrative judge, if an individual introduces evidence (1) that she is a member of a protected group, (2) who suffered an adverse employment action (3) which gives rise to an inference that the action was a result of prohibited discrimination, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Chappell-Johnson v. Powell*, 440 F.3d 484, 488-89 (D.C. Cir. 2006); *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); Initial Decision at 6. In *Gregory v. Department of the Army*, 114 M.S.P.R. 607, ¶ 40 (2010), while the Board did not abandon the *McDonnell Douglas* requirement that an appellant introduce evidence sufficient to give rise to an inference of unlawful discrimination in order to shift the burden onto the employer to articulate a nondiscriminatory reason for the action, it recognized that in most, if not all, federal employment cases, that burden-shifting framework is not particularly apt because the agency will normally have already articulated a nondiscriminatory reason for taking the action by charging misconduct or poor performance. In other words, in cases such as this one, the question of whether the appellant has introduced sufficient evidence to raise an inference of discrimination gives way to the ultimate question of whether the appellant has proven discrimination by a preponderance of the evidence.

¶10 In the instant case, the appellant has asserted that Mr. Thorne is a similarly situated employee outside her protected class who engaged in similar misconduct and was not terminated. For another employee to be deemed similarly situated

for purposes of an affirmative defense of discrimination based on disparate treatment, all relevant aspects of the appellant's employment situation must be "nearly identical" to that of the comparator employee. Thus, to be similarly situated, a comparator must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. *Gregory*, 114 M.S.P.R. 607, ¶ 44. However, the record reflects that Mr. Thorne was not separated from his prior positions due to unfavorable employment or conduct, unlike the appellant, and there is no evidence indicating that Mr. Thorne failed to disclose his employment information with an intent to deceive the agency or that he was charged with having an intent to deceive the agency. *See* Initial Decision at 7-8. Furthermore, as noted by the administrative judge, the deciding official in the instant case testified that he did not know Mr. Thorne or the circumstances surrounding his failure to disclose and that he was not involved in the decision regarding Mr. Thorne's misconduct. *Id.* Accordingly, we discern no reason to disturb the administrative judge's finding that the appellant and Mr. Thorne were not similarly situated and that the appellant failed to establish that the agency's proffered reason was not the real reason for her removal. *Id.* at 8; *see Gregory*, 114 M.S.P.R. 607, ¶ 41.

The penalty of removal is reasonable for the sustained charge.

¶11 Where, as here, all of the agency's charges are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Singletary*, 94 M.S.P.R. 553, ¶ 9.

¶12 The consistency of the penalty with those imposed upon other employees for the same or similar offenses is one of the factors to be considered under *Douglas* in determining the reasonableness of an agency-imposed penalty. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 20 (2010). While the administrative judge correctly found that the appellant failed to meet her burden with respect to proving her affirmative defense of disparate treatment, the gravamen of the appellant's argument in this regard is that her coworker, Mr. Thorne, also failed to provide accurate information on his OF 306 but was not terminated. *See* IAF, Tab 14 at 4. Thus, the appellant has implicitly raised a disparate penalties claim, and we must consider the appellant's contention that the agency treated a similarly situated employee differently using a disparate penalties analysis.

¶13 To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6 (2010) (citing *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983)). Other factors may include whether the difference in treatment was knowing and intentional, whether an agency began levying a more severe penalty for a certain offense without giving notice of a change in policy, and whether an imposed penalty is appropriate for the sustained charges. *Id.*, ¶ 15 n.4 (citing *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009)).

¶14 If an appellant shows that the charges and circumstances surrounding the charged behavior are substantially similar, "the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268, ¶ 10 (2010) (quoting *Lewis*, 113 M.S.P.R. 657, ¶ 6). To trigger the agency's burden, there must be enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly situated employees differently, but the Board will not

have hard and fast rules regarding the "outcome determinative" nature of these factors. *Lewis*, 113 M.S.P.R. 657, ¶ 15.

¶15 We find that the agency's burden has not been triggered here. As noted above, there are differences not only between the offenses committed by the appellant and Mr. Thorne but also in that there is no indication that the appellant and Mr. Thorne were in the same work unit or had the same supervisor. *See* Initial Decision at 7-8. Specifically, Mr. Thorne failed to disclose that he was dismissed from two prior jobs for "not possessing the necessary skills" and as a result of a "cutback in workforce" respectively, while the appellant failed to disclose that she was dismissed from ASQ and FATS for "unfavorable employment or conduct" and was "not eligible for rehire."[1] *See* IAF, Tab 14 at 8-9; *id.*, Tab 9, Subtab 4d. Furthermore, the deciding official testified that he did not know Mr. Thorne or the circumstances surrounding his failure to disclose or the subsequent decision to issue him a letter of caution, indicating that any difference in treatment between the appellant and Mr. Thorne was not knowing and intentional on the part of the deciding official. *See* Initial Decision at 7-8; IAF, Tab 14 at 9.

¶16 Additionally, there is no evidence that the agency necessarily began levying a heavier penalty without notice, as the record indicates that since 2009 three other agency employees failed to disclose that they were terminated from prior positions[2] and that each of those employees chose to resign following management's recommendation of termination. IAF, Tab 14 at 8-9. Moreover,

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[1] The record also indicates that there was no record of a degree that Mr. Thorne reported to the agency as earned. However, there is no indication in the record of an intent to deceive the agency in that regard. *See* IAF, Tab 14 at 8-9.

[2] Employee D failed to disclose that he was terminated by a prior employer for attendance issues; Employee F failed to disclose that she was terminated by a prior employer for "failure to properly log on and off"; and Employee K failed to disclose that he was previously terminated from federal employment for insubordination. IAF, Tab 14 at 8-9.

the Board has consistently held that the penalty of removal for falsification of government employment documents is within the bounds of reasonableness because such falsification raises serious doubts regarding the appellant's honesty and fitness for employment. *Christopher v. Department of the Army*, 107 M.S.P.R. 580, ¶ 21, *aff'd*, 299 F. App'x 964 (Fed. Cir. 2008). Thus, we find that the imposed penalty of removal is appropriate for the sustained charge and that the appellant failed to show that the charges and the circumstances surrounding the charged behavior of Mr. Thorne are substantially similar in order to establish her disparate penalties claim. *See Thomas v. Department of Defense*, 66 M.S.P.R. 546, 552 (the consistency of the penalty is only one of the factors to be considered under *Douglas* in determining the reasonableness of the agency-imposed penalty), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table); *see also Lewis*, 113 M.S.P.R. 657, ¶ 6.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's

decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.